

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MICHAEL SWANSON D/B/A JUICY
BITS AND
JUICYBITSSOFTWARE.COM, an
individual,

Plaintiff,

v.

INSTAGRAM, LLC

Defendant.

Cause No. 2:15-cv-00503

COMPLAINT FOR
TRADEMARK
INFRINGEMENT FALSE
DESIGNATION OF ORIGIN
AND UNFAIR BUSINESS
PRACTICES

JURY TRIAL DEMANDED

Plaintiff Michael Swanson d/b/a “Juicy Bits” and “juicybitssoftware.com”
complains of Defendant Instagram, LLC as follows:

NATURE OF LAWSUIT

This is a complaint for false designation of origin under Section 43(a) of
the Lanham Act (Count I), infringement of common law trademark rights
(Count II) and violation of the Washington Consumer Protection Act (Count
III).

PARTIES

1. Plaintiff Michael Swanson d/b/a “Juicy Bits” and “juicybitssoftware.com” (“Mr. Swanson”) is an individual residing within this judicial district in Sammamish, Washington.

2. Mr. Swanson is engaged in the business of developing mobile software applications for mobile devices, including cellular phones and tablet computers. In particular, Mr. Swanson focuses his efforts on developing programs for Apple mobile devices, and other devices which operate on the Apple “iOS” operating system.

3. Upon information and belief, Defendant Instagram, LLC (“Instagram”) is a Delaware limited liability corporation authorized to do business in the State of Washington and in this Judicial District.

4. Upon information and belief, Instagram is engaged in the business of hosting and licensing user-submitted photographs in an online platform. Instagram hosts and licenses user-submitted photographs from every state in the United States. Upon information and belief, Instagram earns revenues by acquiring and selling various forms of data from its users; as well as from licensing its collection of photographs.

JURISDICTION AND VENUE

5. This is an action for false designation of origin arising under Title 15 U.S.C. §1125(a). This Court has jurisdiction over the subject matter of the Complaint under 28 U.S.C. §1338(a). This Court has supplemental jurisdiction over the related common law and state claims pursuant to 28 U.S.C. §§ 1338(b) and 1367.

6. Personal Jurisdiction over the defendant is proper in this Court as the defendant has an Internet presence in this District and conducts business in this district. Venue in this judicial district is proper under 28 U.S.C. §§ 1391(b) and

1 (c) in that a substantial part of the events giving rise to the infringement claims
2 herein have taken place and may still be taking place in this judicial district.

3 **FACTS**

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5 7. Mr. Swanson is a talented and well-known Pacific Northwest mobile
6 software application ("mobile application") developer and former Microsoft
7 employee. Since 2009 Mr. Swanson has developed numerous, successful
8 mobile applications. Mr. Swanson develops most of his products as an
9 independent developer and offers them for sale and download at the "App
10 Store" maintained and operated by Apple, Inc.

11 8. Some of Mr. Swanson's works currently available for download at the
12 "App Store" include: "Halftone" "Halftone 2," "3D Camera," "Spypix," and
13 "Layout." Earlier mobile applications developed by Mr. Swanson and
14 previously made available at the "App Store" include "Nature Images,"
15 "Textures HD," and "Nature Images HD." These mobile applications all relate
16 generally to various means of photograph and video editing to be accomplished
17 within a user's mobile device.

18 9. Mr. Swanson's "Halftone" application has been downloaded worldwide
19 over 1.84 million times to-date. Halftone was selected by Apple as one of the
20 best Photo & Video apps in "App Store Rewind 2011," and was considered the
21 "iPhone and iPad APP OF THE WEEK." In addition, Halftone was selected as
22 a Starbucks "Pick of the Week," and was featured in both the "New and
23 Noteworthy" and "What's Hot" sections of the Apple App Store. "Halftone 2"
24 has been downloaded worldwide over 1.34 million times to-date, and was
25 selected as one of Apple's "Editor's Choice" and "App Store Best of 2013."
26 Similarly, Mr. Swanson's "3D Camera" application has been downloaded
27 worldwide over 2 million times and is currently rated 4.5/5 on Macworld.com

1 (see, <http://www.macworld.com/product/95811/3d-camera.html>). Finally, Mr.
2 Swanson's "Spypix" application has over 15,000 downloads worldwide to-date.

3 **MR. SWANSON'S DEVELOPMENT OF HIS "LAYOUT"**
4 **APPLICATION**

5 10. Beginning in late 2011 and continuing into 2012, Mr. Swanson
6 developed a new mobile application to be used to arrange, edit, and share
7 photographs in an easy-to-use interface. To distinguish and identify his new
8 mobile application, Mr. Swanson adopted the name and trademark "LAYOUT."
9 Mr. Swanson's photo editing and sharing application has been made available
10 to users throughout the United States and the world under the mark,
11 "LAYOUT" since at least as early as July, 2012.

12 11. Mr. Swanson's Layout application obtains photographs for editing from
13 popular social media sites such as Facebook, Flickr, and Instagram, as well as
14 photographs stored locally on a user's mobile device. Using the Layout
15 application, users can combine multiple photographs into one image in a variety
16 of different displays, and allow for various forms of image filtering, editing, and
17 mirroring. Descriptions of the Layout application and its functionality are
18 attached as Exhibit A, "Layout Description" and Exhibit B, "Layout Screen
19 Captures."

20 **MR. SWANSON'S USE OF HIS "LAYOUT" MARK**

21 12. Following development of his Layout application, Mr. Swanson
22 submitted the application to Apple's App Store using the ordinary electronic
23 form Apple provides.

24 13. Upon information and belief, in order to submit a mobile application to
25 be considered for distribution on Apple's App Store, a developer must provide
26 Apple with the name of the mobile application to be considered. *See*, Exh. C
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1 “App Submission Example.” If the proposed name is already in-use within the
2 Apple App Store, an error message will appear, informing the applicant
3 accordingly. *Id.*

4 14. Prior to submitting his Layout application for consideration, Mr.
5 Swanson diligently searched the Apple App Store for similar applications
6 containing the mark “LAYOUT” or variations thereof and found no such prior
7 uses of the mark.

8 15. Mr. Swanson has used the “LAYOUT” mark continuously in United
9 States commerce since July of 2012 in connection with his photo editing
10 application. Mr. Swanson's Layout application has been downloaded
11 approximately 41,000 times worldwide since its release in July 2012, with
12 approximately 27,000 of those downloads occurring in the United States and
13 Canada. Mr. Swanson's Layout application was hailed by Apple as an “Editor's
14 Choice” and an “App Store Best of 2012.” See, Exh. A.

15 16. By virtue of his widespread, continuous, and substantially exclusive use
16 of the mark, “LAYOUT” to identify his photo-editing application, Mr. Swanson
17 has acquired common law trademark rights in and to the name, mark, and
18 trading style, “LAYOUT” as used in connection with photo-editing mobile
19 applications. By virtue of his widespread distribution and sales of his Layout
20 application, Mr. Swanson's common law rights in the “LAYOUT” mark are
21 believed to extend throughout the United States.

22 **INSTAGRAM'S ACTS OF INFRINGEMENT**

23 17. On or about March 23, 2015, Defendant Instagram launched its own
24 photo-editing mobile application under the names and trading styles,
25 “LAYOUT” and “LAYOUT FROM INSTAGRAM.” Upon information and
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1 belief, Instagram's Layout application has been downloaded by numerous
2 individuals throughout the United States and within this judicial district.

3 18. Upon information and belief, Instagram's Layout application also lets
4 users arrange, edit, and share photographs in a similar interface. The application
5 can also obtain such photographs for editing from user's Instagram account, as
6 well as photographs stored locally on a user's mobile phone. Chiefly,
7 Instagram's Layout allows users to combine multiple photographs into one
8 image in a variety of different displays, and allows for various forms of image
9 filtering and mirroring. *See*, Exhibit D, "Instagram's Layout Description;" *see*
10 *also*, Exhibit E, "Screen-Captures of Instagram's Layout."

11 19. Upon information and belief, prior to Instagram's introduction of its
12 Layout application, Mr. Swanson's product was the only photo-editing mobile
13 application identified with the mark and name, "LAYOUT" available at
14 Apple's App Store or elsewhere.

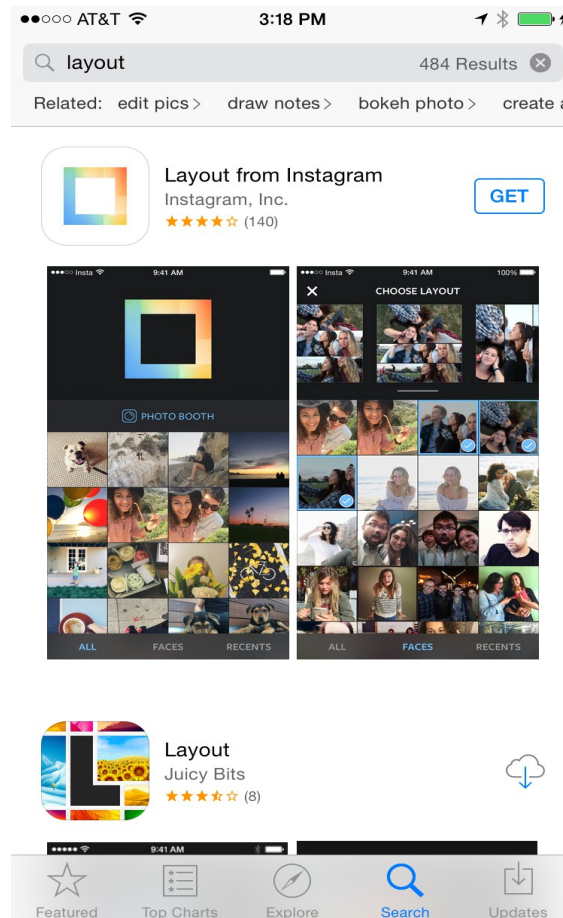
15 20. Upon information and belief, prior to Instagram's adoption and use of the
16 mark "LAYOUT," a search for the term "layout" within the Apple App Store
17 resulted in Mr. Swanson's Layout mobile application being listed at the top of
18 the search results within the App Store.

19 21. Upon information and belief, it is well-known in the mobile application
20 industry that being placed at the top of search results is considered extremely
21 valuable.

22 22. Upon information and belief, Instagram had actual knowledge of Mr.
23 Swanson's Layout application and corresponding use of his "LAYOUT" mark
24 as early as July 2012 when Mr. Swanson's application was first made available
25 for download from Apple's App Store.
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ADVERSE CONSEQUENCES TO MR. SWANSON

23. Upon information and belief, shortly after the release of Instagram's Layout, Mr. Swanson's Layout application lost its position in the search results for a search of "layout" in the Apple App Store. A true and accurate screen-capture of how the two applications appeared in the App Store on March 27, 2015 is attached as Exhibit F and is included herein:



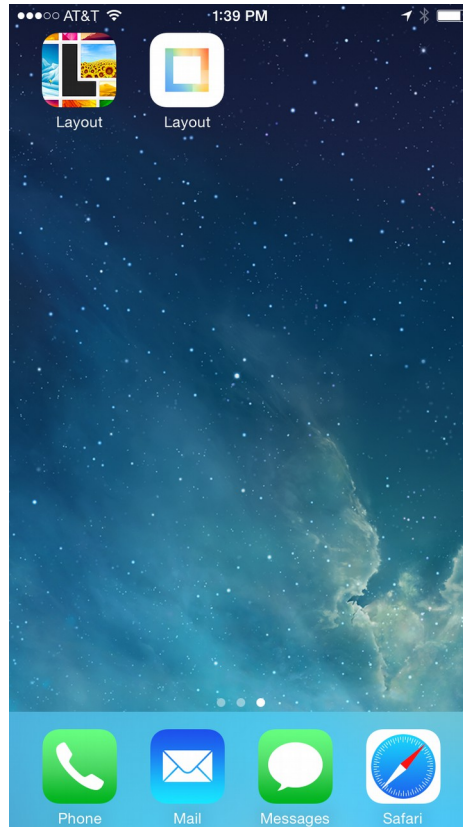
24. As of March 27, 2015 Layout from Instagram is now considered one of Apple's "Top Free iPhone Apps." See, Exhibit F, "Search Results for 'layout.'"

25. As a direct and proximate result from losing this position in search results, Mr. Swanson's market position, reputation, and goodwill has been

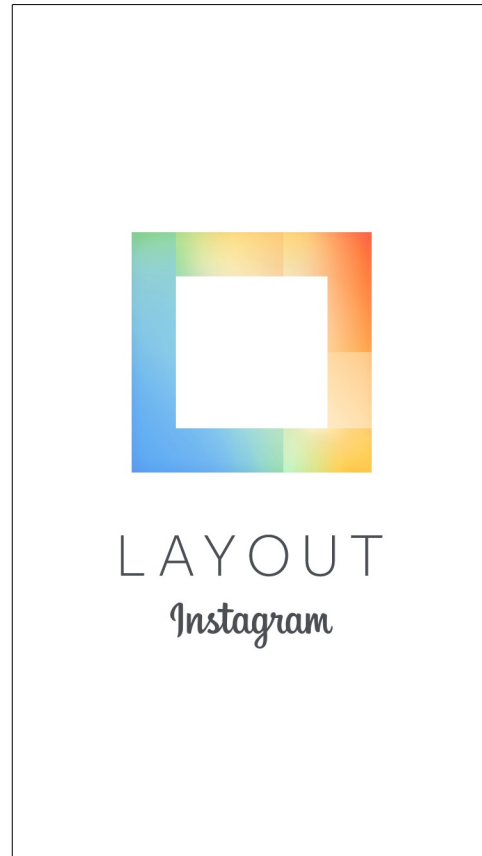
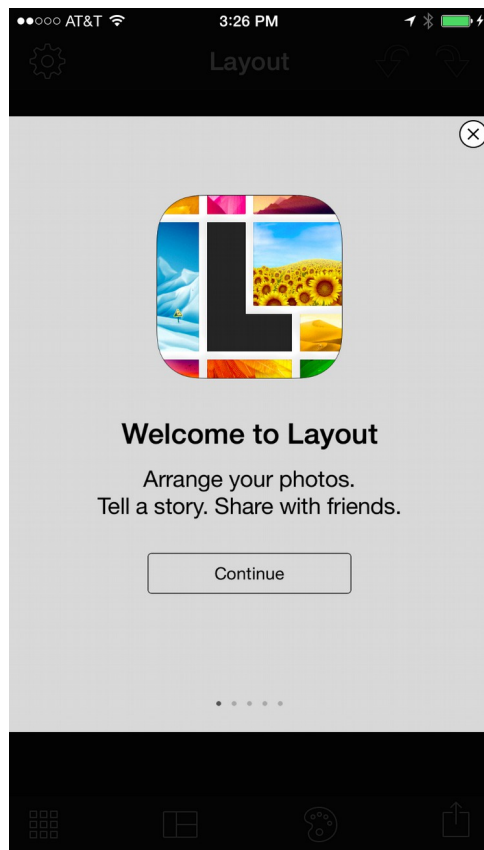
1 harmed and is likely to be harmed in the future, for which no remedy at law
2 exists.

3 26. As a direct and proximate result from losing this position, Mr. Swanson
4 will lose revenues he would otherwise receive for his Layout application.

5 27. Once downloaded by a user, the label of Instagram's application clearly
6 reads as "Layout," which is identical to how Mr. Swanson's application appears
7 on a user's mobile device. A screen-capture of the two icons is attached herein
8 and is included as Exhibit G, "Screen-Capture of App Icons," with Mr.
9 Swanson's application appearing on the left:



24 28. Further, the opening screens of Layout from Instagram show that
25 Instagram itself refers to its app as "Layout." *See*, Exh. E. This is similar to how
26 Mr. Swanson's Layout appears. *Compare*, Exh. B to Exh. E:
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29. Additionally, Instagram itself refers to its app as “Layout” elsewhere in the application description, and on its own website. *See, e.g.,* Exhibit. D, “Instagram’s Layout Descriptions”: “With Layout, it’s easier than ever to unlock your creativity.” [...] “When you open Layout...” [...] “You must give Layout access to your phone’s camera roll...” [...] “No, you don’t need an Instagram account to use Layout.” [...] “Layout’s smooth, intuitive process gives you...”

30. Instagram’s use of the marks “LAYOUT” and “LAYOUT FOR INSTAGRAM” on its photo-editing application is likely to cause confusion with Mr. Swanson’s prior use of “LAYOUT” in connection with his photo-editing application. Indeed, Instagram’s confusing use of the mark “Layout” has been reported upon by various news publications. *See, Exhibit. H.,* “Collection of News Articles Regarding Confusion.”

1 31. Further, even more news organizations and individuals refer to
 2 Instagram's Layout product as "Layout," thereby evidencing the apparent
 3 confusion in the marketplace between Instagram's Layout, and Mr. Swanson's
 4 Layout. *See*, Exhibit. I , "Collection of News Articles Regarding Instagram's
 5 Layout."

6 32. Still other instances of actual confusion in the marketplace have
 7 occurred. In particular, other online news sources, writers, and marketing
 8 companies have incorrectly "linked" to Mr. Swanson's Layout application when
 9 speaking of Instagram's Layout application, and *vice versa*. *See*, Exhibit J,
 10 "Samples of Instances of Actual Confusion." For example, *Interview*
 11 magazine's Facebook page confusingly links to Mr. Swanson's Layout
 12 application when describing Instagram's Layout application. *Id.*

13 33. Instagram's use of the marks, "LAYOUT" and "LAYOUT FOR
 14 INSTAGRAM" are causing actual confusion in the marketplace as to the source
 15 of the photo-editing applications offered by Mr. Swanson and Instagram, is
 16 likely to continue to cause such confusion and is causing both economic and
 17 non-economic harm to Mr. Swanson for which no adequate remedy at law is
 18 available.

19 CAUSES OF ACTION

20 **COUNT I: VIOLATIONS OF THE LANHAM ACT**

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 22 34. Mr. Swanson incorporates the allegations made in paragraphs 1 through
 23 33 as if fully set forth herein.

24 35. Instagram's unauthorized use of the mark, name and trading style,
 25 "LAYOUT" and "LAYOUT FOR INSTAGRAM" in connection with photo-
 26 editing mobile applications is likely to cause confusion, mistake, and/or to
 27 deceive consumers as to the source of origin of their products. Instagram's

1 actions are likely to cause potential purchasers for Mr. Swanson's Layout
2 application to believe that Instagram's Layout application has an affiliation,
3 connection, association, origin, or sponsorship relationship with Mr. Swanson's
4 company, or vice versa.

5 36. By displaying the mark, name and trading style, "LAYOUT" to generate
6 initial interest and thereafter directing potential customers to different products,
7 Instagram diverts sales revenue from Mr. Swanson and interferes with his
8 business. Instagram's actions thus constitute a false designation of origin in
9 violation of the Lanham Act, 15 U.S.C. § 1125(a)(1).

10 37. Mr. Swanson has been and will continue to be irreparably harmed by
11 Instagram's actions. Unless Instagram is enjoined from continuing its
12 unauthorized use of Mr. Swanson's "LAYOUT" mark and from falsely
13 representing the actual origin of its goods and services, such irreparable harm
14 will continue.

15 38. By virtue of Instagram's unauthorized use of the "LAYOUT" mark, Mr.
16 Swanson is entitled to recover all of Instagram's profits attributable to such use,
17 as well as damages sustained by Mr. Swanson and the costs of this action that
18 result from Instagram's use of the "LAYOUT" mark. To the extent Instagram's
19 actions in this regard have been willful, Mr. Swanson is entitled to a trebling of
20 these damages as well as an award of reasonable attorneys' fees pursuant to 15
21 U.S.C. § 1117(a)

22 **COUNT II: COMMON LAW TRADEMARK INFRINGEMENT**

23 39. Mr. Swanson incorporates the allegations made in paragraphs 1 through
24 33 above as if fully set forth herein.

25 40. By virtue of his substantially exclusive, continuous and widespread use
26 of the mark, name, and trading style, "LAYOUT" in connection with photo-
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1 editing mobile applications, Mr. Swanson has obtained enforceable common
2 law rights in and to the mark, "LAYOUT" as used in such applications.

3 41. Instagram's subsequent adoption and use of the mark, name, and trading
4 style, "LAYOUT" for competing photo-editing mobile applications is likely to
5 cause confusing among the consuming public and, thus, infringes Mr.
6 Swanson's common law rights in and to the mark, "LAYOUT."

7 42. Mr. Swanson has been and will continue to be irreparably harmed by
8 Instagram's actions. Unless Instagram is enjoined from continuing its
9 unauthorized use of Mr. Swanson's "LAYOUT" mark and from falsely
10 representing the actual origin of its goods and services, such irreparable harm
11 will continue.

12 **COUNT II: VIOLATION OF WASHINGTON CONSUMER**
13 **PROTECTION ACT**

14 43. Mr. Swanson incorporates the allegations made in paragraphs 1 through
15 33 above as if fully set forth herein.

16 44. Instagram's actions in falsely suggesting a connection between Mr.
17 Swanson's "LAYOUT" mark and Instagram's competing product and to deceive
18 consumers as to the actual origin of the goods offered and sold have and are
19 having a deleterious impact on the public interest and have caused injury to Mr.
20 Swanson's business and property.

21 45. Instagram's actions as alleged above amount to a violation of the
22 Washington Consumer Protection Act, RCW § 19.86 et seq.

23 46. Mr. Swanson is and will continue to be irreparably harmed by
24 Instagram's actions unless it is enjoined from falsely representing the actual
25 origin of its own goods and services.
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1 47. Mr. Swanson is entitled to collect damages under RCW § 19.86.090 for
2 Instagram's willful actions, as well as trebling of damages and an award of
3 attorneys' fees.
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PRAYER FOR RELIEF

WHEREFORE, Plaintiff, Mr. Swanson, prays for the following relief:

A. A preliminary and permanent injunction enjoining Instagram from further use of the mark, "LAYOUT" or colorable imitation thereof in connection with photo-editing mobile applications.

B. An order entering judgment in favor of Mr. Swanson and awarding damages to Mr. Swanson in the amount of Mr. Swanson's actual damages and any profits of Instagram attributable to the infringing acts alleged herein, consistent with 15 U.S.C. § 1117.

C. An award of full costs and reasonable attorneys' fees against Instagram and in favor of Mr. Swanson pursuant to 15 U.S.C. § 1117.

D. Such other further relief the Court may deem just and proper.

JURY DEMAND

Mr. Swanson demands a trial by jury on all issues presented in this Complaint.

Dated this 31st day of March, 2015.

Respectfully submitted,

/s/ Philip P. Mann

Philip P. Mann, WSBA No: 28860

Timothy J. Billick, WSBA No. 46690

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